

REMARKS

Claims 1-23 were presented for examination and were pending in this application. In an Official Action dated July 19, 2005, claims 1-23 were rejected. Applicant thanks Examiner for examination of the claims pending in this application and addresses Examiner's comments below.

Applicant herein amends claims 1, 12, 21, 22, and 23. These changes are believed not to introduce new matter, and their entry is respectfully requested. The claims have been amended to expedite the prosecution of the application in a manner consistent with the Patent Office Business Goals, 65 Fed. Reg. 54603 (Sept. 8, 2000). In making these amendments, Applicant has not and does not narrow the scope of the protection to which Applicant considers the claimed invention to be entitled and does not concede that the subject matter of such claims was in fact disclosed or taught by the cited prior art. Rather, Applicant reserves the right to pursue such protection at a later point in time and merely seeks to pursue protection for the subject matter presented in this submission.

Based on the above Amendment and the following Remarks, Applicant respectfully requests that Examiner reconsider all outstanding objections and rejections, and withdraw them.

Response to Rejections Under 35 USC 102(e) and (b)

In the Office Action the Examiner rejects claims 1, 12, and 21 under 35 USC § 102(e) as allegedly being anticipated by U.S. Patent No. 6,625,657 ("*Bullard*").

Based on the above Amendment and the following Remarks, Applicant respectfully submits that for at least these reasons claims 1, 12, and 21 are patentably distinguishable over

the cited reference. Therefore, Applicant respectfully requests that Examiner reconsider the rejection, and withdraw it.

In a rejection under 35 U.S.C. §102, each and every claim element must be present in the applied reference. However, the Examiner has failed to point out any prior art teaching which anticipates the explicit recitation in the language of claim 1 that "a capture system coupled to the flow processor for filtering and buffering the collected data based on the collected data and the flow corresponding to the collected data"; and "a main processor for processing the filtered data based on the collected data and the flow corresponding to the collected data." As understood *Bullard* at best merely discloses an "aggregate flow processor 13 that is a central collection point for all network accounting records (NAR's) produced from various data collectors 52a-52g and aggregates, i.e., summarizes related information from the received NARs across the accounting support arrangement 10." Column 4, lines 24-31. The system of *Bullard* processes accounting records from the collectors 52. But the system of *Bullard* does not include a capture system for filtering and buffering the collected data based on the collected data and the flow corresponding to the collected data as recited in claim 1. Lacking at least this claimed feature, *Bullard* cannot render claim 1 unpatentable. For similar reasons, *Bullard* cannot render claims 12 and 21 unpatentable. Therefore, it is respectfully submitted that the rejection is improper and should be withdrawn.

In the Office Action the Examiner rejects claims, 1, 2, 12, 13, and 21 under 35 U.S.C. §102(b) as allegedly being anticipated by U.S. Patent No. 6,137,782 ("*Sharon*").

Based on the above Amendment and the following Remarks, Applicant respectfully submits that for at least these reasons claims 1, 2, 12, 13, and 21 are patentably

distinguishable over the cited reference. Therefore, Applicant respectfully requests that Examiner reconsider the rejection, and withdraw it.

In a rejection under 35 U.S.C. §102, each and every claim element must be present in the applied reference. However, the Examiner has failed to point out any prior art teaching that anticipates the explicit recitation in the language of claim 1 that "a capture system coupled to the flow processor for filtering and buffering the collected data based on the collected data and the flow corresponding to the collected data"; and "a main processor for processing the filtered data based on the collected data and the flow corresponding to the collected data." As understood, *Sharon* at best merely discloses a network monitor 32 that receives packets traveling through a network segment. Column 6, lines 49-54. A network parser 34 filters data from the monitor 32 according to a parser filter 36, and sorts each frame. The network parser 34 summarizes the sorted data. Column 6, line 63-column 7, line 7. A data transfer module 40 sends data to a central management engine (CME) 12 that analyzes the data. The CME 12 may send data to a LMAP module 18. Column 7, lines 25-34. The LMAP module 18 receives agent report events from the CME 12 and places the events in a queue. The LMAP 18 uses a thread process using a transfer thread 24 to transfer files from a main thread 22 to a parser thread 26, which places analyzed data into data storage. Column 8, lines 39-59. It is not specified in the Office Action which elements of *Sharon* allegedly correspond to specific claim limitations of claim 1. The Examiner is respectfully reminded of the provisions of 37 CFR §1.104(c)(2) (cited in MPEP §706):

"When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be

designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified."

Further, as stated in MPEP §707:

"In accordance with the patent statute, 'Whenever, on examination, any claim for a patent is rejected or any objection . . . made,' notification of the reasons for rejection and/or objection together with such information and references as may be useful in judging the propriety of continuing the prosecution (35 U.S.C. 132) should be given."

As understood, the network parser 34 of *Sharon* filters and summarizes agent reports from the CME 12. The system of *Sharon* does not use a flow as a basis for filtering and buffering. Thus, the network parser 34 of *Sharon* is not "a capture system coupled to the flow processor for filtering and buffering the collected data based on the collected data and the flow corresponding to the collected data" as recited in claim 1. Lacking at least this claim feature, Sharon cannot render claim 1 unpatentable. For similar reasons, *Sharon* cannot render claims 2, 12, 13, and 21 unpatentable. Therefore, it is respectfully submitted that the rejection is improper and should be withdrawn.

Response to Rejection Under 35 USC 103(a)

In the Office Action the Examiner rejects claims 3-9, 14-20, and 22 under 35 U.S.C. §103(a) as allegedly being unpatentable over *Sharon* in view of U.S. Patent Application Publication No. 2002/0154653 ("*Benveniste*"). This rejection is respectfully traversed.

Based on the above Amendment and the following Remarks, Applicant respectfully requests that the Examiner reconsider the rejection, and withdraw it.

"35 U.S.C. §103 authorizes a rejection where, to meet the claim, it is necessary to modify a single reference or to combine it with one or more others. After indicating that the rejection is under 35 U.S.C. § 103, there should be set forth [by the Examiner] (1) the difference or differences in the claim over the applied references, (2) the proposed modification of the applied references necessary to arrive at the claimed subject matter, and (3) an explanation of why such proposed modification would be obvious." MPEP § 706.02.

Applicant respectfully asserts that the combination suggested by the Examiner's rejection under 35 U.S.C. § 103 is improper. It is well settled law that when making a rejection under 35 U.S.C. § 103, the Examiner has the burden of establishing a prima facie case of obviousness. The Examiner can satisfy this burden "only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references" in the manner suggested by the Examiner. *In re Fine*, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). "[E]lements of separate prior patents [and/or publications] cannot be combined when there is no suggestion of such combination anywhere in those patents [and/or publications]...; and a court should avoid hindsight..." (emphasis added; annotations within square brackets).

Panduit Corp. v. Dennison Mfg. Co., 1 USPQ2d 1593, 1597 (Fed. Cir. 1987), citing *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 220 USPQ 929, 933 (Fed. Cir. 1984), and *W.L. Gore & Associates v. Garlock, Inc.*, 220 USPQ 303, 313 (Fed. Cir. 1983). See also *Uniroyal Inc. v. Rudkin-Wiley Corp.*, 5 USPQ2d 1434, 1438-1441 (Fed. Cir. 1988). In fact,

it is impermissible to use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 5 USPQ2d at 1600.

Benvensite is directed to a carrier-sense multiple access with collision avoidance (CSMA/CA) system. *Benvensite* includes a backoff range buffer 506, an age limit buffer 502, and a persistence factor buffer 508 to order transmission of data for a try of a send of data to avoid collisions of data in the system. See paragraph 0098.

However, unlike the claimed invention, *Benvensite* is not directed to a probe apparatus for application monitoring. In contrast to the Examiner's position, the buffers in *Benvensite* are not the capture or focus buffers recited in claim 3. The capture system of claim 3 filters the collected data stored in the capture buffer and the filtered data is sent to the focus buffer. Thus, *Benvensite* is fundamentally different from the claimed invention.

It is respectfully submitted that in making the present rejection under 35 U.S.C. § 103, the Examiner has employed impermissible hindsight in using the Applicant's disclosure and claims to conduct a search of the prior art to locate a reference directed to a a probe apparatus (that is, *Sharon*). The Examiner recognized, however, that *Sharon* did not include at least capture buffer or a focus buffer. Consequently, the Examiner conducted an additional search to locate a reference that appeared to teach a capture buffer and a focus buffer (that is, *Benvensite*). Once *Benvensite* was identified, the Examiner concluded that it would have been obvious to one of ordinary skill in the art to modify *Sharon* to include capture buffer and a focus buffer on the basis of *Benvensite*. Given the fundamental differences between the claimed invention and *Benvensite* and *Sharon*, however, Applicant respectfully asserts that it is not proper to cite *Benvensite* simply because *Benvensite* discloses the element(s) of the claimed invention which the base reference *Sharon* lacks.

In support of the combination, the Examiner contends that "a person in the art would be motivated to combine the cited references "in order to determine how the backoff distribution parameters adjusted on successive retries following transmission failure."

Sharon is a monitoring system that performs analysis on the traffic. There is no suggestion or motivation in *Sharon* to include backoff distribution parameters of *Benvensite*. In order to support a rejection under 35 U.S.C. § 103, however, the Examiner must provide "some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references." *In re Fine*. The Examiner has not cited an objective prior art reference which provides an incentive, motivation, or suggestion for making the suggested combination. Also, the Examiner has not established by objective evidence that knowledge generally available to one of ordinary skill in the art would lead one to make the suggested combination. Thus, Applicant respectfully asserts that the suggested combination is improper.

Even if, *arguendo*, the references could be combined, the result would still not constitute the claimed invention.

Specifically, the combination of *Sharon* and *Benvensite* would provide a monitoring system with buffers for a retry transmission system. This is not the capture buffer or focus buffer recited in claims 3-8, 4-19 and 22. This is not the flow processor recited in claims 9 and 20.

For all of the above reasons, Applicant respectfully asserts that claim 3 is patentable over *Sharon* and/or *Benvensite*, and that the combination is improper in any case, and therefore respectfully request that the Examiner reconsider and withdraw the rejection.

Claims 4-8 depend from claim 3, and claim 14 is generally similar to claim 3. Claim 22 is generally similar to claim 3. Thus, Applicant respectfully asserts that claims 15-19 and 22 are also patentable over *Sharon* and/or *Benvensite*, and that the combination is improper in any case, and therefore respectfully request that the Examiner reconsider and withdraw the rejection. Claims 9 and 20 depend on claims 1 and 12, respectively. Thus, Applicant respectfully asserts that claims 9 and 20 are also patentable over *Sharon* and/or *Benvensite*, and that the combination is improper in any case, and therefore respectfully request that the Examiner reconsider and withdraw the rejection.

In the Office Action the Examiner rejects claims 10, 11, and 23 under 35 USC §103(a) as allegedly being unpatentable over *Sharon* in view of U.S. Publication No. 2002/0154653 ("*Benveniste*") and U.S. Patent Application Publication No. 2002/0073380 to *Cooke et al.* ("*Cooke*"). This rejection is respectfully traversed.

Based on the above Amendment and the following Remarks, Applicant respectfully requests that the Examiner reconsider the rejection, and withdraw it.

Applicant respectfully asserts that the combination suggested by the Examiner's rejection under 35 U.S.C. § 103 is improper.

The arguments for the impropriety of the combination of *Sharon* and *Benvensite* are incorporated here. In addition, *Cooke* teaches away from the claimed invention because there is no suggestion in *Sharon* to modify or combine *Sharon* with a circuit designing method of *Cooke*. It is respectfully submitted that in making the present rejection under 35 U.S.C. § 103, the Examiner has employed impermissible hindsight in using the Applicant's disclosure and claims to conduct a search of the prior art to locate a reference directed to a monitoring system (that is, *Sharon*). The Examiner recognized, however, that *Sharon* did not

include at least an FPGA. Consequently, the Examiner conducted an additional search to locate a reference that appeared to teach a FPGA (that is, *Cooke*). Once *Cooke* was identified, the Examiner concluded that it would have been obvious to one of ordinary skill in the art to modify *Sharon* to include FPGA on the basis of *Cooke*. Given the fundamental differences between the present invention and *Cooke* (or *Sharon*), however, Applicant respectfully asserts that it is not proper to cite *Cooke* simply because *Cooke* discloses the element(s) of the claimed invention which the base reference *Sharon* lacks.

Even if, *arguendo*, the references could be combined, the result would still not constitute the claimed invention. Specifically, the references individually or in combination does not suggest "a capture system coupled to the flow processor for filtering and buffering the collected data based on the collected data and the flow corresponding to the collected data"; and "a main processor for processing the filtered data based on the collected data and the flow corresponding to the collected data" as recited in claims 10-11.

For all of the above reasons, Applicant respectfully asserts that claims 10-11 are is patentable over *Sharon*, *Benvensite*, and/or *Cooke*, and that the combination is improper in any case, and therefore respectfully request that the Examiner reconsider and withdraw the rejection. Independent claim 23 is generally similar to claim 10. Thus, Applicant respectfully asserts that claim 23 is also patentable over *Sharon*, *Benvensite*, and/or *Cooke*, and that the combination is improper in any case, and therefore respectfully request that the Examiner reconsider and withdraw the rejection.

Conclusion

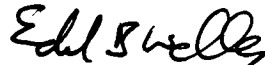
In sum, Applicant respectfully submits that claims 1 through 23 as presented herein, are patentably distinguishable over the cited references (including references cited, but not applied). Therefore, Applicant requests reconsideration of the basis for the rejections to these claims and request allowance of them.

In addition, Applicant respectfully invites Examiner to contact Applicant's representative at the number provided below if Examiner believes it will help expedite furtherance of this application.

Respectfully Submitted,
MIKE MORAN, TAURAS LIUBINSKAS,
AND JACK GORAL

Date: DEC 28, 2005

By:



Edward B. Weller, Reg. No. 37,468
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
Phone: (650) 335-7642
Fax: (650) 938-5200